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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

PACIFICA FOUNDATION, *Respondent*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This case involves the narrow question as to whether the Federal Communications Commission (the "Commission") has the authority to proscribe the broadcast, in any context, of specific words solely on the grounds that they are generally regarded as offensive. The United States Court of Appeals for the District of Columbia Circuit ruled in the Opinion below (Pet.

App. A) that the Commission does not have such authority. The factual context in which this question is presented is summarized briefly below.

On February 22, 1975, the Commission released a *Declaratory Order and Memorandum Opinion and Order in the Matter of a Citizen's Complaint Against Pacifica Foundation, Station WBAI(FM)* ("Order") (Pet. App. B) wherein it declared certain words to be "indecent" within the meaning of that term as used in Section 1464 of the United States Criminal Code (18 U.S.C. Section 1474). (Pet. App. B at 70-72, ¶¶ 11, 12 & 14). The Order construed "indecent" as referring to "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. . . ." (Pet. App. B at 70-71, ¶ 11). The Commission emphasized that "indecent language," as defined in the Order,

> is distinguished from obscene language in that it (1) lacks the element of appeal to prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.

(Pet. App. B at 71, ¶ 11). The Order explicitly forbade the broadcast in any context of seven specific words [1] and, thus, created an *Index Verborum Prohibitorum*. The Order further declared that the broad-

[1] The seven words used in the Carlin monologue which, according to the Commission, "depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television," are set forth at paragraph 14 of the Order. (Pet. App. B at 72).

cast of such language during times of the day when children may reasonably be expected to be in the audience constitutes a *per se* violation of the Criminal Code and is *per se* contrary to the public interest. (Pet. App. B at 70-71, 72-73, & 73-74, ¶¶ 11, 14, & 16). The Order also suggested that, should a licensee broadcast language of the sort encompassed by the Commission's definition of "indecent" during late evening time periods "when the number of children in the audience is reduced to a minimum," the Commission "might conceivably" consider whether material containing "indecent" language "has serious literary, artistic, political or scientific value" in determining whether the broadcast was in violation of Section 1464 or was contrary to the public interest (Pet. App. B at 71, 73-74, ¶¶ 12, 16); [2] however, the Order left this matter in a state of limbo.

The Order was issued in response to a citizen's complaint concerning particular material broadcast over noncommercial educational FM Station WBAI, New York, New York, which is licensed to the Respondent herein, Pacifica Foundation ("Pacifica"). The material complained of was a selection entitled "Filthy Words" from the record album "George Carlin Occupation: Foole," which was recorded before a live audience at the Circle Theatre, San Carlos, California. This selection was broadcast over WBAI at approximately 2:00 p.m. on a weekday afternoon during the concluding portion of "Lunchpail," a regularly scheduled live program. The subject of "Lunchpail" on the day the

[2] Under the Commission's formulation of the elements which constitute "indecency," there is no need of showing appeal to prurient interest whether the audience be composed of adults or children.

selection was broadcast had been contemporary attitudes towards the use of language and the program's host had presented his own commentary and analysis regarding this topic and discussed the matter by telephone with listeners. The host played the selection "Filthy Words" at the conclusion of the program because he regarded it as an "incisive satirical view of the subject under discussion." The selection uses a number of words which are undeniably regarded as offensive by many people, and the complaint was directed at the broadcast of these words which the complainant characterized as "garbage."

Pacifica sought review of the Order, invoking the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit pursuant to 47 U.S.C. Section 402(a) and 28 U.S.C. Section 2342. The court below held that the Order contravened Section 326 of the Communications Act which prohibits the Commission from censoring radio communications since the Order was overbroad and vague, and the court set aside the Order on this narrow ground. It is this action of the court below which is at issue in this case.

ARGUMENT

The court below was clearly correct in its ruling that the Commission's Order was invalid in that it was overbroad and vague and thus contravened Section 326 of the Communications Act. Moreover, the opinion does not raise any substantial question of federal law concerning the Commission's regulatory authority. Finally, the opinion below in no way creates a conflict with the decisions of any other court of appeals or of this Court. Accordingly, review by this Court is not warranted.

I. The Decision Below Was Clearly Correct.

The court below was clearly correct in its ruling that the Commission's Order was invalid in that it was overbroad and vague and thus in contravention of Section 326 of the Communications Act.

The Commission's Order is fundamentally overbroad in both scope and effect and thereby is contrary to the anti-censorship provisions of Section 326. The Order refers to patently offensive language which describes sexual or excretory activities and organs. (Pet. App. B at 70-71, 72-73, ¶¶ 11, 12 & 14). It is clear, however, that the sweep of the Order is much broader. Under the Commission's definition of "indecent" any and all uses of certain words which in their origin or some of their applications refer in a patently offensive manner to sexual or excretory functions or organs are banned whether such a word, as actually used in context, described a sexual or excretory activity or organ or whether it is used colloquially in a context where it cannot conceivably be construed as describing or even referring to sex or excretion. If one of the common usages of a given word is as a synonym for a sexual organ or an excretory function, and if the word is also generally regarded as "patently offensive," the Order declares that the broadcast of such a word is *per se* a crime and is *per se* contrary to the public interest regardless of whether the use of the word causes, or could reasonably be expected to cause, injury or harm to any listener, and regardless of whether the word is used in the context of a program which has substantial literary, artistic, political or scientific value.[3] Such

[3] The Commission's definition of "indecent" language that it maintains can be barred from broadcast over the media is substantially overbroad under *Miller* v. *California*, 413 U.S. 15 *rehearing*

a ban on words *qua* words contravenes the basic principle that offensive words or ideas may be proscribed only where they are presented in such a context as to constitute a direct threat to some substantial societal interest and that protection of the public from offensive words or ideas does not itself constitute such a substantial societal interest.[4]

The Commission's action was predicated largely upon its belief that certain words can be banned, absolutely, from the airwaves without limiting or inhibiting in any way the free expression in the broadcast medium which is protected from governmental interference by the First Amendment and Section 326 of

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denied, 414 U.S. 81 (1973). Moreover, the Commission's definition of "indecent" is inherently boundless. Not only does the definition itself fail to present a readily ascertainable general principle for distinguishing the seven words used in the Carlin monologue from other offensive words, but once there is acceptance of the rationale of protecting the sensibilities of the public which underlies the Commission's action, there is no readily ascertainable principle which would prevent the Commission from protecting the public's sensibilities from any other forms of expression which might offend. *See also Cohen* v. *California*, 403 U.S. 15 (1971).

[4] *See e.g., Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Lewis* v. *New Orleans*, 415 U.S. 130 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Miller* v. *California*, 413 U.S. 15 (1973); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972); *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Cohen* v. *California*, 403 U.S. 15 (1971); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Roth* v. *United States*, 354 U.S. 476 (1957); *Dennis* v. *United States*, 341 U.S. 494 (1951); *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Tollet* v. *United States*, 485 F.2d 1087 (8th Cir. 1973); *Grove Press, Inc.* v. *Christenberry*, 276 F.2d 433 (2d Cir. 1960); *United States* v. *One Book Called "Ulysses,"* 72 F.2d 705 (2d Cir. 1934).

the Communications Act. The Commission contends that its Order "is not intended to stifle robust, free debate on any controversial issues confronting our society" or "to modify [its] previous decisions recognizing broadcasters' broad discretion in programming ideas." (Pet. App. B at 67-68, 73-74, ¶¶ 7, 16).

However, the direct effect of the Commission's Order is to proscribe the broadcast of the seven words referred to in the Carlin monologue as "the ones you couldn't say on the public airwaves," and all similarly offensive words, irrespective of the context in which they are broadcast. It is clear that the words prohibited by the Order may often be presented in the context of a program having literary, artistic, social, or political value and thus, the broadcast itself would be in the public interest.[5] Yet, the Commission's ban, as promulgated, would clearly sweep so broadly as to prohibit the broadcast of such programming.[6]

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[5] As recognized by the court below, some illustrative examples of material banned from the air by the Order would include the works of Shakespeare, Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and even the Bible. (Pet. App. A at 15).

[6] In its Order, the Commission relies upon an *atavistic* conception of the scope of governmental authority to regulate expression which has not been recognized by any federal court since Judge Learned Hand exposed its inherent incompatability with the principles of the First Amendment in *United States* v. *One Book Called "Ulysses,"* 72 F. 2d 705 (2d Cir. 1934). In that case, Judge Hand held that the obscene character of a work could not be determined by judging isolated passages lifted out of context, and he observed that to hold otherwise would permit the suppression of "much of the great works of literature." *Id.* at 708. Judge Hand's holding in *"Ulysses"* has been repeatedly ratified by the Court, *see, e.g. Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49 (1973); *Miller* v. *California*, 413 U.S. 15 (1973); *Roth* v. *United States*, 354 U.S. 476 (1957).

The Commission's Order may also be seen as overbroad when examined from two other perspectives. First, the net effect of the Order ostensibly predicated on a desire to protect children, is to limit the adult population to only such programming as is fit for children. This is a classic example of overbreadth. *Butler* v. *Michigan,* 352 U.S. 380 (1957); *United States* v. *Pellegrino,* 467 F. 2d 41 (9th Cir. 1972); *United States* v. *Levine,* 83 F. 2d 156 (2d Cir. 1936). Second, implicit in the Order, is the notion that *every* use of these seven banned words will be deemed offensive as to minors. It strains credulity to assume that these words will be offensive even as to minors in every conceivable context in which they could be presented. In this regard, it is manifest that the Order is overbroad. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975).

Additionally, the Court below correctly found that the Order is defective on the grounds of vagueness. As the Commission itself states, it "shaped its Order" to further the "special societal interest in protecting young children from sexually explicit materials." (Pet. at 14). However, the Order is so vague that it even fails to define the term "children."[7] This Court has held that in evaluating the requisite capacity of individual choice that the actual age of the individual minor is a significant factor to be considered.[8] Yet as emphasized by the court below, the "Order does not even consider age as a factor, much less a significant one." (Pet. App. A at 15).

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[7] The fact that a statute is intended to protect minors, by itself, is not sufficient to justify a statute which is otherwise unconstitutionally vague. *Interstate Circuit, Inc.* v. *Dallas,* 390 U.S. 676 (1968).

[8] *Rowan* v. *Post Office Dept.,* 397 U.S. 728 (1970).

Moreover, in an attempt to save itself from a successful challenge on the grounds of overbreadth,[9] the Order provides that it is possible that the ban may not be applied at all times; during the late night-time hours, the Order states that "a different standard *might conceivably be used.*" (Pet. App. B at 71, ¶ 12) (emphasis added). However, the Order fails to specify at what time the number of children comprising the listening audience will be sufficiently low as to permit use of a more relaxed standard. It is clear that this inherent vagueness supports invalidation and not affirmation of the Order.

II. There Is No Important Question of Federal Law

The Commission's Petition does not raise any issue worthy of certiorari.[10] The opinion below held only that the Commission's Order was overbroad and vague in violation of the anti-censorship provision of 47 U.S.C. Section 326. (Pet. App. A at 2, 13, 18, 19-20). Notwithstanding this narrow holding, the Commission contends that the following important questions of federal law are presented by the decision:

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[9] As recognized by Chief Judge Bazelon, "protected speech will not reach all who have a right to hear it, unless they are willing to forego sleep," since the Order "bans indecent speech whenever it is 'reasonably likely' that children will be in the audience, which is all but the late night hours." (Pet. App. A at 29-30, n. 20, *citing, Young* v. *American Mini Theatres,* 427 U.S. 50, 76-78 (1976) (Powell, J. concurring)).

[10] Of great significance in this regard is the fact that the United States Department of Justice which shares concurrent authority and responsibility with the Commission with respect to the enforcement of Section 1464 of the Crimina Code has decided neither to seek certiorari on its own nor to support the Commission's Petition for Certiorari in this case. *Cf. FCC* v. *American Broadcasting Co., Inc.,* 347 U.S. 284 (1954).

1. Whether the broadcast medium's unique qualities and the requirement that broadcasters program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory action, to the prohibition of indecency in 18 U.S.C. § 1464 at times when there is a strong probability that unsupervised children are in the audience.

2. Whether the FCC correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464.

As will be demonstrated in the discussion that follows, neither of these questions is properly presented by this case.

The court below did not even reach the first question posed by the Commission. Indeed, the court expressly stated that it was *not* "deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected. . . ." (Pet. App. A at 2). Rather, the majority opinion merely held that the challenged ruling was overbroad and vague and thus carried the Commission "beyond protection of the public interest into the forbidden realm of censorship." (Pet. App. A at 2). In reaching this conclusion, the court below noted the Commission's contention that in order to carry out its duties to promote the use of radio and television communications in the public interest, it enjoys an exception from the requirements of the First Amendment and that "[t]he basis of this claim is that the broadcast medium is unique." (Pet. App. A at 13). However, the court found that, in order to decide this

case, it was not necessary to resolve the issue as to whether the unique qualities of broadcasting create an exception to the First Amendment as claimed by the Commission. The court assumed for the purposes of this case "that the FCC has the power to prohibit non-obscene speech from being broadcast . . .," and it held that notwithstanding this power, the Commission's Order was an invalid exercise of such power because it was overbroad and vague. (Pet. App. A at 13 & 18).[11]

Notwithstanding the limited nature and scope of the holding of the court below, the Commission contends that the decision below, "establish[es] that only hard core pornography falling within the definition of *Miller* v. *California,* 413 U.S. 15 (1973) may be barred from broadcasting over the nation's air waves by Section 1464" and that "such a proposition should not be finally established for the entire nation's broadcast medium until this Court has had a full opportunity to consider" whether the "unique qualities" of broadcasting alluded to in the Commission's Order give the Commission authority to adopt a definition of "indecency" which is substantively different from the *Miller*

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[11] No credence can be given to the Commission's contention that the opinion below operates to curtail its authority to regulate non-obscene speech thereby raising a substantial federal question. In support of this proposition the Commission has made reference to a wholly unrelated case, *The Trustees of the University of Pennsylvania,* FCC 75-1333, December 4, 1975, (Pet. at 10), which is still being prosecuted by the Commission. However, that case clearly demonstrates that the Commission, notwithstanding the *Pacifica* decision, perceives that it has the authority to regulate non-obscene speech, continues to act as if it has such authority, and in no way feels itself constrained or limited by the lower court's *Pacifica* decision. Thus, its contention that an important issue of federal law arises with respect to such authority, is wholly contrary to its present practices in prosecuting cases involving non-obscene speech.

definition of "obscenity" for the purposes of enforcement of Section 1464. (Pet. at 8). There is clearly no merit to this contention. As recognized by the Commission in its statement of the case (Pet. at 7), the court below did not find it necessary to decide "the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected" (Pet. App. A at 2) and the court left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium.[12] Accordingly, since the question posed in the Commission's Petition as to the extent of its authority to construe the term "indecent" as used in Section 1464 as having a meaning different from the term "obscene" was not considered, let alone resolved, by the court below, this question is clearly not now ripe for review by this Court.

The second question raised by the Commission's Petition is "[w]hether the FCC correctly found that language [*as*] *broadcast* in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464." (Pet. at 2) (emphasis added). This question is not presented by the Commis-

[12] In view of the care which the court below took to make clear that it was *not* deciding the question as to whether the terms "indecent" and "obscene" have different meanings for the purposes of applying 18 U.S.C. § 1464 to broadcasting, *United States* v. *Simpson*, 561 F.2d 53 (7th Cir. 1977), a case which involved interpretation of the terms "indecent" and "obscene" as used in § 1464 in a *non-broadcast* context, cannot possibly have the effect which the Commission attributes to it of transmuting the decision below into a decision which "establish[es] that only hard core pornography falling within the definition of *Miller* v. *California* . . . may be barred from broadcasting."

sion's Order and was not considered by the court below. It is, thus, not properly before this Court.

The Commission's Order did not merely hold that the words used in the Carlin monologue were "indecent as broadcast." Rather, the Order was issued because it was the Commission's judgment that such a procedure was "admirably suited" both to terminate the controversy raised by the specific complaint concerning the broadcast of the Carlin monologue over WBAI, and "to clarify the standard, which the Commission utilized to judge 'indecent language.'" (Pet. App. B at 73, ¶ 15). Thus, the Commission specifically "adopted a legislative type rule which it then applied to the facts of the case," (Pet. App. A at 19-20, n. 2 (Bazelon, C.J. concurring)) instead of merely considering the words "as broadcast." The effect of the Order, as pointed out by the court below, was to "sweepingly [forbid] any broadcast of the seven words irrespective of context or however innocent or educational they may be . . . ." (Pet. App. A at 14-15). It is, thus, clear that the Order was not limited to the words "as broadcast" and that the court below was not called upon to consider, and did not reach, the question posed in the Commission's Petition as to whether the words used in the Carlin monologue were "indecent as broadcast."

III. There Is No Conflict of Decision

The Commission maintains that this Court should grant a writ of certiorari "because the questions presented by this case require a reconciliation of conflicting constitutional interests . . . ." (Pet. at 7-8). There is clearly no merit to this contention. Quite to the con-

trary, as discussed above, the issue in the present case, as considered by the court below, is narrowly drawn and no amount of strained semantics can convert it into one warranting review by this Court whether on the basis of "importance" or on the basis of "conflict between decisions." Simply stated, there is no conflict between decisions resulting from the majority opinion. The court below did not render a decision in conflict with the decision of any other court of appeals on the same matter, nor did it decide a federal question in a way in conflict with applicable decisions of this Court."

Notwithstanding the fact that it is unable to demonstrate that this case properly comes within either of the foregoing recognized and legitimate standards for the grant of certiorari, the Commission contends that this Court should grant certiorari because of "conflicting constitutional interests" resulting from the lower court's opinion. This argument must fail first, because the foregoing concept of "conflicting constitutional *interests*" (emphasis added) is one *not* recognized by the Court as a legitimate standard for certiorari, and second, because as previously noted, the decision below is in no sense a constitutional holding.

Moreover, even assuming arguendo, first, that the standard proferred by the Commission would be accepted by this Court as a legitimate basis for the grant of certiorari, and second, that there is such a "conflict of constitutional interests" under the facts presented, it is well recognized that, if it appears upon consideration of a petition for certiorari that the case can be decided on another ground, thus making it unneces-

[13] Sup. Ct. R. 19.

sary to reach the issue which is claimed to involve a conflict, the presence of the conflict, standing alone, will not constitute a sufficient reason for granting review. See *Sanson Hosiery Mills* v. *N.L.R.B.*, 344 U.S. 863 (1952); *The Arlington, Inc.* v. *Mayer*, 339 U.S. 965 (1950). Clearly, the present case can properly be resolved on the basis of the correctness of the lower court's sole determination that the Commission's Order was vague and overbroad in contravention of Section 326.

Accordingly, the Commission's contention that this case involves a "conflict" worthy of the grant of certiorari is wholly devoid of merit.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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